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No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1946

GEORGE WILLIAM DODEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 189–200) is reported at 154 F. 2d 637.

JURISDICTION

The judgment of the circuit court of appeals was entered March 18, 1946 (R. 189). The petition for a writ of certiorari was filed April 12, 1946, and was granted May 6, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in a prosecution for failure to report for work of national importance petitioner should have been permitted to defend on the ground that he was wrongfully denied classification as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act are set forth in Appendix A, pp. 57–61, of the Brief for the United States on Reargument in *Gibson* v. *United States,* No. 23, this Term. The applicable provisions of the Selective Service Regulations are set forth in the Appendix hereto, *infra,* pp. 18–23.

STATEMENT

Petitioner was indicted (R. 2–3) in the United States District Court for the Northern District of Ohio in one count charging a violation of Section 11 of the Selective Training and Service Act of 1940. The indictment alleged that pursuant to petitioner's claim that he was a conscientious objector, he was classified in IV–E and ordered to report on April 21, 1944, for work of national importance, and that he knowingly failed to do so. He was convicted after a jury trial (R. 112) and was sentenced to imprisonment for five years (R. 130–131). Upon appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment was affirmed (R. 139).

It was undisputed at the trial that petitioner was finally classified in IV-E by his board of appeal; that on February 21, 1944, he reported for a preinduction physical examination and was found acceptable for service; that the local board thereafter ordered petitioner to report on April 21, 1944, for work of national importance; and that petitioner willfully refused to comply with the order of his local board (R. 13–15, 51, 56–57). The sole disputed issue concerned the legality of the administrative proceedings in which petitioner's claim to classification as a minister of religion in the Jehovah's Witnesses sect was rejected. The relevant facts, as reflected by petitioner's selective service file, which was received in evidence (R. 15, 17),[1] may be summarized as follows:

Having registered on June 30, 1942, with Local Board No. 2, Wayne County, Ohio (R. 13, 156), petitioner, on September 21, 1942, filed his selective service questionnaire (R. 146–150), in which he stated that he was 20 years of age; that he had a high school education; that since January 1941,

[1] While the entire selective service file was received in evidence, the printed record before the Court includes only some of the documents in that file. In order that documents in the file which we believe are relevant and which are not printed in the record may be considered by the Court, we have caused the clerk of the circuit court of appeals to certify to this Court the same photostatic copies of all the documents in the file which were before the court below (see R. 144–145).

he had been affiliated with the Watchtower Bible and Tract Society; that he was an ordained minister of religion with "1¾ years experience in this kind of work"; that he was also a farmer from 1938 to 1942; that he was conscientiously opposed to all war; and that he believed he was entitled to a IV–D classification, as a minister of religion.

On September 26, 1942, petitioner filed a special form for conscientious objectors (R. 150–154), in which he stated that he was opposed by reason of religious training and belief to both combatant and noncombatant military service; that he believed in the use of "force in the fight for righteousness" but that "if one is going to be a Christian he must not take part in the affairs of this world because the world is against Christ's Kingdom"; that since January 1941 he gave expression to his religious beliefs by "witnessing at every opportunity from house to house and on the street and elsewhere"; and that the Jehovah's Witnesses organization has "No creed or official statements—each person must make his own choice and take his own stand for the New World."

Petitioner also filed with the local board an affidavit (R. 160–162) in which he said that he had been a member of Jehovah's Witnesses since July 1941; that since May 6, 1942, he had been a pioneer in the sect, which occupied "the greater amount of my time"; that "the duties that I per-

form as a pioneer is to go from house to house and preach the gospel of the Kingdom and declare the day of vengeance of Jehovah, to comfort all that mourn, place literature and assist interested parties in gaining knowledge of the truth"; and that he had been commissioned by the Watch Tower Bible and Tract Society "to preach the gospel of God's Kingdom." Petitioner's claim was supported by affidavits of other persons and by documents purporting to show that he was an ordained minister of religion (R. 157–160, 163–165).

On October 26, 1942, the local board by a vote of 4 to 0 classified petitioner I–A, as available for military service, with a notation in its minutes, "Selling Jehovah Witness Literature at Public Square" (R. 149). On November 25, 1942, the local board reaffirmed the I–A classification, with the notation in its minutes "not an ordained minister as per public recognition" (R. 150). Petitioner then requested a personal appearance before the local board (R. 167–168) and the minutes of the board reveal that on December 7, 1942, a hearing was had, and that after reconsidering the case, the board again reaffirmed the I–A classification (R. 150). Petitioner's request for a second hearing was denied (see R. 169), and on December 17, 1942, he appealed to the board of appeal (R. 149). As permitted by Selective

Service Regulation 627.12,[2] petitioner included in his notice of appeal (R. 170–171) a summary of the facts concerning his hearing before the local board on December 7, 1942, and his efforts to secure a second hearing; he urged that he be classified IV–D because "all the facts in my file and case show that I have been a regular minister of religion since May 7, 1942, prior to my registration of June 30, 1942," and because the local board acted capriciously and with prejudice in classifying him I–A.

While the case was pending on appeal before the board of appeal, petitioner submitted to the local board information, including a document issued by the Watchtower Society (R. 172), to the effect that on January 21, 1943, he became "the head of the entire Wooster [Ohio] Company [of Jehovah's Witnesses], that is head of a congregation," and requested that the local board reconsider his classification (R. 173). It appears from correspondence dated May 7, 10, and 12, 1943 (see fn. 1, *supra*, p. 3), that all of this mate-

[2] This section provides:

"The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

rial was forwarded to the board of appeal for consideration by it in classifying petitioner. On June 4, 1943, the board of appeal classified petitioner in IV–E.

More than seven months later, on January 15, 1944, petitioner requested the local board to reopen his classification. In a letter to the board (R. 179–180) petitioner restated his claim to classification as a minister and he submitted "additional evidence" which "has been called to your attention before when I personally talked to each of you, except Dr. Adair" (R. 179). The "additional evidence" consisted of a minister's license (R. 176) issued by the county probate court; a newspaper clipping reciting that he had recently officiated at a marriage (R. 180); a statement signed by numerous persons stating that petitioner was the minister of their congregation (R. 174–176); and photographs of the meeting place of the congregation and of petitioner apparently presiding at a meeting of the congregation (R. 177–178). It appears from a letter dated February 10, 1944, contained in the selective service file, that the local board reviewed the information submitted and concluded that it did not warrant reopening the classification.

At petitioner's request[1] his selective service file was sent to National Headquarters of the Se-

[1] See his letter, in the selective service file, of February 18, 1944.

lective Service System, but it appears that the Director of Selective Service declined to take an appeal to the President."

It was at this juncture of the administrative proceedings that petitioner was physically examined and found acceptable for service and was ordered to report for work of national importance, in lieu of military service (*supra*, p. 3).

In addition to the documentary evidence summarized above, the trial court permitted petitioner to adduce *de novo* evidence calculated to show that as of the time of the trial he was a minister of religion. Mrs. Sauer testified that the Jehovah's Witnesses organization in Wooster, Ohio, had no membership as such, but that she was affiliated with the Jehovah's Witnesses (R. 23); and that she had signed a document stating that she recognized petitioner as a minister of religion who preaches and teaches the principles of the Watchtower Bible and Tract Society (R. 22, 158). On cross examination she testified that she was a Jehovah's Witness, but that she was not a minister of religion (R. 25).

Petitioner testified on direct examination that at the time that he registered under the Selective Training and Service Act and thereafter, he "was a duly ordained minister of the Gospel, preaching the Gospel of the Kingdom only" (R. 26). He

[1] See the letter, in the file, of August 9, 1943, from State Headquarters to the local board.

said that he relied upon the Scriptures for his ordination and that his ministerial status commenced in January 1941, when he received an identification card from a representative of the Watchtower Society which, as he testified, stated that anyone possessing such a card is a minister of religion (R. 28–29). Petitioner testified that after receiving the card he "began to preach the Gospel of the Kingdom in accordance with the regulations stated by the Watchtower Society" by preaching "the Gospel of the Kingdom from house to house, in territory that I am definitely assigned" (R. 29); "I call on each individual in that territory, and present to them the Message of the Kingdom. Those who are interested, a call is made at a later date, and a Bible study is arranged in their home" (R. 29). Petitioner said that in addition he conducts funeral and baptismal services, delivers sermons, looks after the congregations, sees that the bills of the church are properly taken care of, and that someone takes care of cleaning the church building (R. 30).

On cross-examination petitioner testified that 102 persons are associated with the Jehovah's Witnesses in Wooster and that each possesses an identification card which is the same as his, and that each is therefore a minister (R. 52–54). Thereafter, on redirect examination, he explained that these persons are not ministers in the same sense that he is (R. 57, 60); that he is the "man,

aging agent" for the Watchtower organization in Wooster (R. 63).

In submitting the case to the jury, the trial judge instructed them that the Selective Training and Service Act provides that the decisions of the local boards shall be final, except where an appeal is taken (R. 105). The jury was further instructed (R. 107) that they should find petitioner guilty if they found that he was a male person who had registered under the Act and who knowingly failed to report for work of national importance in accordance with an order of his local board (see also R. 108–109, 110).

SUMMARY OF ARGUMENT

When *Falbo* v. *United States*, 320 U. S. 549, was decided the applicable Selective Service Regulations permitted a camp director to reject a selectee who was found upon examination at the camp to be unfit for service. For this reason the Court held that a selectee had not exhausted his administrative remedies until he was accepted at the camp. Since then the procedure has been amended. Since February 2, 1944, a selectee is given a pre-induction physical examination and is issued a certificate of fitness if he is qualified for service under the Act. The camp director possesses no authority to reject a selectee who is assigned to his camp. For these reasons we think that a selectee's administrative remedies are now exhausted when he receives a certificate of fitness and thereafter is ordered to

report for work of national importance. Petitioner received a certificate of fitness on February 21, 1944, and he was ordered to report on April 21, 1944, for work of national importance. Consequently, we think, he exhausted his administrative remedies and should have been permitted to defend on the ground that he was illegally classified, in accordance with the standard prescribed in *Estep* v. *United States*, Nos. 66 and 292, decided February 4, 1946. Since this defense was not passed on in the trial court, we respectfully submit that the judgment of the circuit court of appeals should be reversed and that the case should be remanded to the district court for such further proceedings as are proper.

ARGUMENT

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT FOR SUCH FURTHER PROCEEDINGS AS ARE PROPER

In *Falbo* v. *United States*, 320 U. S. 549, this Court held that a registrant who failed to report to a Civilian Public Service Camp for work of national importance, as ordered by his local board, thereby failed to exhaust his administrative remedies and therefore was not entitled to defend on the ground that he was illegally classified. The rationale of the decision, as we now understand it, was that at the time of Falbo's violation he had not yet been finally accepted for service, for there remained a possibility that, if he had reported to the camp for

work of national importance, he might have been rejected by the camp director.

Like Falbo, petitioner was classified IV–E, he was assigned to a Civilian Public Service camp, he was ordered to report for work of national importance at the camp and he failed to report. Recognizing this, the circuit court of appeals concluded (R. 194) that petitioner had not exhausted his administrative remedies by reporting at the camp to which he was assigned and that the trial court therefore properly denied petitioner the opportunity to challenge the classification as a defense to the indictment.

In our view, the circuit court of appeals improperly assimilated this case to the *Falbo* case. As we point out in our brief in the *Gibson* case (pp. 11–14), under the selective service procedure in effect when petitioner underwent the process, after a registrant is classified IV–E he is ordered to report for a pre-induction physical examination (Reg. 629.1–629.2). If he is found to be fit for work of national importance he is issued a certificate of fitness which constitutes the final administrative determination of his acceptability (Reg. 629.32).[5] Thereafter, he is assigned to a Civilian Public Service Camp by the Director of Selective

[5] Registrants classified for military service are given a second physical examination at the induction station after they have responded to the induction order. Hence, in their cases their administrative remedies have not been exhausted until they are found acceptable at the induction station.

Service and the local board thereupon issues its order to report for work of national importance (Reg. 652.11). As soon as the registrant leaves his local board en route to the camp he is "under the jurisdiction of the camp to which he is assigned" (Reg. 652.13). Every registrant who reports to the camp to which he is assigned must be accepted by the camp director; since February 2, 1944, the camp director has possessed no authority to reject a registrant (Reg. 653.11).[6]

It is in the latter respect that the procedure differs from that which prevailed at the time of Falbo's case. As we indicate in our brief in the *Gibson* case, at the time of the *Falbo* case a reg-

[6] Section 653.11, as it existed at the time of *Falbo's* case, permitted the camp director to reject a selectee for physical reasons. On February 2, 1944, Section 653.11 was amended to reflect the new selective service procedure by which all selectees are given a pre-induction physical examination and are issued a certificate of fitness if they are found acceptable for service. As amended, Section 653.11 omitted the prior reference to the power of the camp director to reject a selectee; instead, it provided that the director "shall" signify his acceptance of the registrant by noting that fact on D. S. S. Form 221. This provision was in effect on April 21, 1944, when petitioner was required to report for work of national importance. On June 7, 1944, Section 653.11 was further amended to state affirmatively that the registrant should be accepted by the camp director irrespective of the result of the physical examination at the camp. The history of this provision of the regulations and the reasons for the various amendments are fully summarized in a letter from the Selective Service System to the Attorney General, which is set forth in full in Appendix C, pp. 75–80, of the Government's brief in the *Gibson* case.

istrant classified IV–E was given a physical examination before being ordered to report to the camp and upon reporting to the camp he was examined again. Where the circumstances warranted it, the camp director was free to reject the registrant for work of national importance, and as the Court noted in the *Falbo* opinion (320 U. S. at p. 553) as of October 15, 1943, 610 of the 8,000 selectees who had reported for civilian work of national importance had been so rejected. Now, however, a selectee may not be rejected at the camp. Accordingly, it is plain that at the time of the *Falbo* case the final determination of acceptability occurred when the registrant was accepted by the camp director. Under the revised procedure applicable to this case, the final determination of acceptability is made when the registrant undergoes a preinduction physical examination. The certificate of fitness is notice to him that he is acceptable for work of national importance. Since the camp director may not reject the registrant, we think it follows that the administrative remedies are exhausted when the registrant's final acceptability is determined. It is true that final acceptance is not made until the registrant reaches the camp, but in view of the fact that acceptance is a foregone conclusion for every registrant who receives a certificate of fitness and is ordered to report to the camp, there would seem to be no logical basis for insisting that the registrant must report to the camp and be

finally accepted by the camp director in order to exhaust his administrative remedies.

The facts of the case show that on February 21, 1944, petitioner reported for his preinduction physical examination and was issued a certificate of fitness (R. 51). In these circumstances, if our view of the selective service procedure is correct, petitioner's acceptability had been determined and he had exhausted his administrative remedies. Accordingly, we think that the court below incorrectly determined that petitioner was not entitled to defend on the ground that he was illegally classified.[1] Since petitioner's defense was not entertained in the district court,[2] we think it would be appropriate for this Court to reverse the judgment of the circuit court of appeals and to remand the case to the district court for a new trial in which petitioner will be permitted to challenge his selective service classification to the extent permitted by this Court's decision in the *Estep* case.

Contrary to the position which we have taken in Part III of the Argument in the *Gibson* case, we do not urge in this case that if the Court decides that the defense was open to petitioner the Court should consider whether the evidence

[1] The circuit court of appeals apparently was not aware of the fact that the selective service procedure had been amended subsequent to the *Falbo* decision.

[2] Some of petitioner's tendered evidence was admitted, but the validity of the defense relied upon by petitioner was not considered in the trial court (see *supra*, p. 10).

which he adduced or offered in the trial court demonstrated that he was not illegally classified. We agree with petitioner that if the defense is open to him the judgment below should be reversed and the case should be remanded for a new trial.

The defense tendered in the *Gibson* case is so plainly without merit that it is not likely that any court would hold that there is no foundation in fact for the rejection of his claim to ministerial classification; for that reason it is in the interest of Gibson, as well as the Government, that this Court now dispose of the question. On the other hand, in view of the evidence before the boards showing that petitioner was the leader of the Wooster unit of Jehovah's Witnesses (*supra*, pp. 6–7), there seems to lurk in this case a nice question concerning the factual foundation upon which the board's classification rests, a question which was not stressed in the courts below. If the defense of illegal classification is open to petitioner and if this Court remands the case for a new trial, the Government will be afforded the opportunity to determine whether to proceed further with the litigation in view of the new issue in the case.[9] If a new trial is had petitioner will have an op-

[9] Whether the Department would proceed with a new trial would depend not upon whether it determined that there is some foundation in fact for the rejection of petitioner's claim, but rather upon the Selective Service System's advice to the Department as to the correctness of petitioner's classification.

portunity to present squarely the question whether there is any foundation in the facts before the selective service boards for rejecting his claim to classification as a minister, in accordance with the standard of judicial review set forth in the *Estep* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the circuit court of appeals should be reversed and that the case should be remanded to the district court for such further proceedings as are proper.

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SEPTEMBER 1946.

APPENDIX

The applicable selective service regulations in effect when petitioner was classified provided as follows:

> 622.44 *Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).
>
> * * * * *
>
> (c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties. (6 F. R. 6607.)
>
> * * * * *
>
> 622.51 *Class IV–E: Conscientious objector available for, assigned to, or released from work of national importance.*—(a) In Class IV–E shall be placed every registrant who would have been classified in Class I–A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service. (7 F. R. 6517.)

(b) Upon being advised by the Director of Selective Service that a registrant who was inducted into the land or naval forces for military service will be discharged because of conscientious objections which make him unadaptable to military service, the local board shall change such registrant's classification and place him in Class IV–E. The Director of Selective Service shall assign such registrant to work of national importance under civilian direction.

* * * * *

626.2 *When registrant's classification may be reopened and considered anew.*— (a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service. (7 F. R. 110, 653, 2089.)

629.1 *Who will be examined.*—(a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent, * * * (9 F. R. 440.)

* * * * *

629.2 *Order to report for preinduction physical examination.*—(a) In accordance with instructions of the Director of Selective Service, the State Director of Selective Service will issue to each local board a Call—Preinduction Physical Examination (Form 224), specifying thereon the number of registrants to be delivered for preinduction physical examination and the time and place fixed for such delivery.

(b) The local board shall mail an Order to Report—Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I–A or Class I–A–O under the provisions of section 623.21 to fill each Call—Preinduction Physical Examination (Form 224) which it receives. In filling such calls, the local board, as far as practicable, shall first select volunteers, then nonfathers, and finally fathers, and within each group shall make such selections in sequence of order numbers without regard to whether the registrant has requested or will request a personal appearance be-

fore the local board and without regard to whether an appeal has been or will be taken.

(c) The local board shall also mail an Order to Report—Preinduction Physical Examination (Form 215) to each registrant classified in Class IV–E when his order number is reached (without regard to whether he has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken) in the process of ordering Class I–A and Class I–A–O registrants to report for preinduction physical examination under the provisions of paragraph (b) of this section.

(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I–A, Class I–A–O, or Class IV–E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service.

(e) At the time the local board prepares the original Order to Report—Preinduction Physical Examination (Form 215), it shall make a copy of such form and shall file the copy in the registrant's Cover Sheet (Form 53). (9 F. R. 440, 1415.)

* * * * * *

§29.32 *Mailing Certificate of Fitness to registrant accepted or rejected.*—When a Certificate of Fitness (Form 218) indicates that a registrant has been accepted for the Army or the Navy or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of

Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40). (9 F. R. 1415.)

* * * * * *

652.13 *Jurisdiction of local board while registrant is engaged in work of national importance.*—A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. Such registrant after he has left the local board in accordance with section 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status. (7 F. R. 111.)

* * * * * *

653.11 *Reception at camps.*—(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) The camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(c) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service. (9 F. R. 1416.)

U. S. GOVERNMENT PRINTING OFFICE: 1944